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No. 85-1002

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT CIAMPITTI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, federal jurisdiction to regulate discharges into "adjacent wetlands" is limited to areas below the mean high water mark.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 58a-59a) is unreported. The district court's opinion granting a preliminary injunction (Pet. App. 1a-35a) is reported at 583 F. Supp. 483. The district court's opinion granting a permanent injunction (Pet. App. 36a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1985. The petition for a writ of certiorari was filed on November 5, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to Section 404 of the Clean Water Act (CWA), 33 U.S.C. 1344, the United States Army Corps of Engineers administers a permit program for the discharge

of dredged or fill material into "waters of the United States." See generally *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985). Without a Corps permit, such discharges are prohibited (33 U.S.C. 1311(a)). Under the Corps' regulations, "waters of the United States"—and hence the scope of the Corps' CWA regulatory jurisdiction—are defined to include, inter alia, "wetlands" that are "adjacent" to water bodies that are "subject to the ebb and flow of the tide" (33 C.F.R. 323.2(a)-(d)).[1]

Pursuant to Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403, the Corps also administers a permit program for the building of structures and for excavating and filling in "navigable waters." See 33 C.F.R. Pt. 322. The scope of the Corps' regulatory jurisdiction under the Rivers and Harbors Act is more limited than under the Clean Water Act. See 33 C.F.R. 323.2(b) and Pt. 329. In waters subject to tidal action, federal regulatory jurisdiction under the Rivers and Harbors Act is asserted over areas below the "mean (average) high water" line (33 C.F.R. 329.12(a)(2)(b)).[2]

2. a. Petitioners own or sought to develop property known as the Diamond Beach site located in Cape May County, New Jersey. The Diamond Beach site is adjacent to

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[1]The regulations define the term "wetlands" as follows (33 C.F.R. 323.2(c)):

> The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

[2]Where possible, the mean high water line is determined by averaging tidal datum over an 18.6-year period. 33 C.F.R. 329.12(a)(2). "Marshlands and similar areas" are subject to Rivers and Harbors Act jurisdiction, "but only so far as the area is subject to inundation by the mean high waters." 33 C.F.R. 329.12(b).

Jarvis Sound, a large tidal body of water that is connected to the Atlantic Ocean. In late 1979 or 1980, petitioners commenced filling portions of the Diamond Beach site with sand (Pet. App. 10a). In 1983, petitioners had a 50-foot pipe and a tide gate placed on a corner of the site in order "to allow storm water to run off the site [and] *to prevent tidal water from coming onto the site*" (*id.* at 5a (emphasis in original)). Although the petitioner primarily responsible for these development activities, Robert Ciampitti, had been advised by his consultants by at least 1980 that areas on the site were probably "wetlands" subject to federal jurisdiction, petitioners did not apply to the Corps for a permit, nor did they contact the Corps to inquire about federal requirements (*id.* at 4a-5a).

When the Corps discovered petitioners' activities in 1983, a Corps official informed Ciampitti that the site contained wetlands subject to federal permitting jurisdiction and directed Ciampitti to halt filling activities in specified areas (Pet. App. 6a). Petitioners refused to comply with a cease and desist order subsequently issued by the Corps (*id.* at 7a-9a), and the United States initiated this action in the district court seeking to enjoin petitioners' unauthorized filling of wetlands and to require restoration of illegally-filled areas. The government also sought civil penalties against Robert Ciampitti. The statutory authorities relied upon by the government were the Clean Water Act, the Rivers and Harbors Act, and the Refuse Act (Pet. App. 3a).[3]

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[3]The Refuse Act, 33 U.S.C. 407, is a subsection of the Rivers and Harbors Act that prohibits, inter alia, the depositing of refuse in "navigable waters," as that term is defined under the Rivers and Harbors Act. The Clean Water Act permit program effectively superseded this provision of the Refuse Act, because a properly-issued Clean Water Act permit is deemed to constitute compliance with the Refuse Act (33 U.S.C. 1342(a)(5) and (k)).

Following evidentiary hearings, the district court entered a preliminary injunction and then a permanent injunction prohibiting further filling activity on approximately 26 acres of the property (Pet. App. 34a-35a, 39a, 54a). The district court also ordered some of the petitioners to apply for a Corps permit to engage in fill activities (*id.* at 55a). In the event that those petitioners failed to apply for a permit or a permit were denied, those petitioners were required to remove the illegally-placed fill and to prepare and implement a plan for restoration of the wetlands (*id.* at 55a-57a).[4]

b. The district court found that the area subject to the injunction against filling was an "adjacent wetland" under the Corps' regulations implementing the CWA. Prior to filling, the area was predominantly vegetated with plants adapted for life in frequently flooded or saturated soil (Pet. App. 11a). The soil in this 26-acre area was "saturated throughout, in most cases directly to the surface" (*ibid.*). The district court found (*id.* at 22a, 44a-45a) that both tidal waters flowing on the surface and groundwaters saturated the soil. Even with the illegally-deposited fill material, much of the area was covered with surface water, and, "without fill, tidal waters would normally flow onto the site" from two directions (*id.* at 12a, 22a).

At trial, the government also attempted to prove that 1.45 acres—all within the area designated as "wetlands" by the court—were below the mean high water line and, therefore, subject to the prohibitions of the Rivers and Harbors Act. Although there was no dispute that some of this 1.45-acre area was below the mean high water line, the district court

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[4]The district court held in abeyance the question of civil penalties against petitioner Robert Ciampitti (Pet. App. 53a, 57a). The court indicated that Ciampitti's efforts to prepare and implement a restoration plan would be considered in the court's later determination of the size or necessity for civil penalties (*id.* at 53a).

found the evidence too inconclusive to establish the precise boundaries of the area below the mean high water line (Pet. App. 39a-41a, 47a). Accordingly, the district court did not base any of the relief it ordered on violations of the Rivers and Harbors Act or the Refuse Act (Pet. App. 47a). Instead, the court premised the relief entirely on its conclusion that the area in question was a wetland subject to Clean Water Act jurisdiction.

On appeal by petitioners, the court of appeals affirmed without an opinion for the reasons set forth in the district court's opinion (Pet. App. 58a-59a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. a. At bottom, petitioners contend that because the district court found that somewhat less than 1.45 acres of the property is below the mean high water line, the courts below necessarily erred in holding that approximately 26 acres were "wetlands" subject to Clean Water Act jurisdiction. This contention confuses the jurisdictional reach of the Rivers and Harbors Act—which extends only up to the mean high water line (33 C.F.R. 329.12)—with that of the Clean Water Act (see page 2 & note 1, *supra*). Because the district court did not base the relief ordered on either the Rivers and Harbors Act or the Refuse Act, the location of the mean high water line is simply irrelevant to the disposition of this case.

This Court's decision in *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), unequivocally repudiates the notion that Clean Water Act jurisdiction over "adjacent wetlands" is bounded by the mean high water line. The Court in *Riverside* approved the Corps'

assertion of regulatory jurisdiction over "adjacent wetlands" and held that flooding from an adjacent water body is not required by the Corps' regulation defining "wetlands." Slip op. 7-8, 12-13. Rather, "saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to and does support wetland vegetation." Slip op. 8. In other words, there is no requirement that a "wetland" be located below the mean high water line nor that it be regularly inundated by tidal flow.

Here, the district court found, as a matter of fact, "the presence of both saturated soil and aquatic vegetation" in the area in question and further found that "the soil saturation 'causes' the growth of the vegetation" (Pet. App. 44a). The district court's findings plainly bring the property within the category of "wetlands" as defined by the Corps' regulation (33 C.F.R. 323.2(c)). Petitioners cannot plausibly dispute that the property is adjacent to a tidal waterbody. These findings establish that petitioners' property falls within the Corps' regulatory jurisdiction under Section 404 of the Clean Water Act. See *Riverside Bayview Homes, Inc.*, slip op. 9.

b. Petitioners erroneously argue (Pet. 4-6, 11-12) that there is a factual inconsistency between the district court's findings that somewhat less than 1.45 acres lie below the mean high water line (Pet. App. 39a-41a) and that "[d]uring normal high tide conditions, surface water covers a majority of the site" (*id.* at 12a). Petitioners apparently fail to recognize that the mean high water line is an average mark. Thus, by definition, tides will often rise higher than the mean. In addition, petitioners never acknowledge that the district court found that the wetlands are saturated by tidal surface waters *and* ground water (*id.* at 22a). Stated differently, the district court was clearly correct in observing (*id.* at 45a (emphasis in original)) that "the fact that we cannot

quite conclude that much of the land is below mean high water does not indicate, as [petitioners] argue, that it is not saturated by surface *or ground water*." Accordingly, the district court's factual findings as to tidal flow on the property present no question warranting this Court's review.

c. The case on which petitioners principally rely, *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935), is totally irrelevant to the delineation of Clean Water Act jurisdiction. That case, which predates the relevant provisions of the Clean Water Act by 37 years, involved a boundary dispute between an upland and a tideland owner. One contested issue was how the line of "ordinary high water"—the boundary under the governing federal law—was to be determined in view of the fact that the range of tides varies according to the lunar phase (296 U.S. at 23).[5] The rule of law governing such boundary disputes has nothing to do with Clean Water Act jurisdiction, nor is it even remotely relevant to the factual issue in this case—whether the disputed area is saturated with water.[6]

2. Petitioners' other contention (Pet. 12-16) is that the decision below conflicts with the court of appeals' decision in *United States* v. *Riverside Bayview Homes, Inc.*, 729

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[5]Specifically, the upland owner argued that the boundary should be established as the mean of high neap tides, which occur when the moon is in its first and third quarters and which do not, on average, rise as high as when the moon is in other phases. The Court instead adopted the rule that a mean of all tides, not just neap tides, determined the boundary. *Borax*, 296 U.S. at 26.

[6]Petitioners' argument (Pet. 12) that *Borax* requires, as a matter of law, that the district court's reference to "normal high tide conditions" in its factual findings be treated as synonymous with the legal term, "mean high water," as used in *Borax*, is incorrect. The district court clearly did not intend the reference to "normal high tide conditions" as a legal benchmark, but instead merely meant that it is not unusual for high tides to cover a substantial part of the property.

F.2d 391 (6th Cir. 1984), rev'd, No. 84-701 (Dec. 4, 1985). That contention, which we believe was without merit in any event (see Pet. App. 42a-45a), no longer warrants consideration in light of this Court's reversal of the Sixth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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